

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Elimination of Rate-of-Return Regulation of	)	RM No. 10822
Incumbent Local Exchange Carriers	)	
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45

**Comments of TCA**

**I. Introduction**

Western Wireless Corporation (“WWC”) filed a Petition for Rulemaking requesting the Commission eliminate rate-of-return (“RoR”) regulation for rural incumbent local exchange carriers (“LECs”).<sup>1</sup> Specifically, WWC is requesting the Commission to: 1) transition the current, embedded cost-based system of universal service support to a system based on forward-looking costs; 2) remove existing subsidies from retail local rates, which would force rural LECs to raise rates to an as-yet-undetermined “affordable” local rate; and 3) remove implicit support from interstate access charges. The Petition offers some broad guidelines on how the Commission may proceed with the elimination of RoR regulation, and provides several “case studies” on why WWC believes it is imperative for the Commission to consider its petition immediately.

TCA opposes WWC’s petition. TCA’s opposition is not due to the end WWC seeks, but rather the justification it offers the Commission. WWC’s “petition” consists of little more than a collection of faulty reasoning, innuendo, misquotations and unsupported allegations smearing rural LECs -- the very entities primarily responsible for providing universal communications service in this nation. Furthermore, the proposal of alternative regulation for rural LECs is already before the Commission. To open yet another proceeding considering the same issue is

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<sup>1</sup> Petition for Rulemaking to Eliminate Rate-of-Return Regulation of Incumbent Local Exchange Carriers, *In the Matter of Elimination of Rate-of-Return Regulation for Incumbent Local Exchange Carriers*, RM-10822 and *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, filed October 30, 2003 (WWC Petition).

duplicative and serves no purpose. TCA suspects that WWC's real intent in filing its "petition" is to detract attention from another Commission proceeding<sup>2</sup> -- the reconsideration of rules governing eligible telecommunications carrier ("ETC") designation and the basis for support for competitive ETCs. The Commission's ongoing Portability Proceeding is primarily the result of WWC's (and to a lesser extent, other wireless carriers) manipulation and abuse of universal service support mechanisms.

TCA is a management consulting firm providing financial, regulatory, management and marketing services for over eighty small, rural LECs throughout the United States. TCA's clients, all subject to RoR regulation, receive support from federal universal service support mechanisms, based on specific rules and regulations and will be directly impacted by a decision made in this proceeding. These comments address the concerns of TCA's clients.

## **II. A Reasonable Opportunity for Cost Recovery – Not Competition - Has Produced, Preserved and Advanced Universal Service.**

There would be no universal access to telecommunications in this nation without providing rural LECs a reasonable opportunity to recover the actual cost<sup>3</sup> of their facilities. Historically, federal and state regulators have used RoR regulation to derive authorized rates and access to high cost support mechanisms, which have generally provided rural LECs a reasonable opportunity to recover the actual costs of what WWC describes as "uneconomic" investments. In exchange for an opportunity to recover the cost of these investments, the rural LEC agreed to provide service to all who request it within their service territory. This responsibility, frequently referred to as the carrier of last resort ("COLR"), virtually assures that rural LECs will be required to invest in facilities that they cannot recover from the requesting customer. The Commission clearly recognized this recently, by stating:

*Rate-of-return regulation has worked well in extending service to rural America, along with our universal service program and the work of state commissions to support service in these areas.*<sup>4</sup>

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<sup>2</sup> See *Federal-State Joint Board on Universal Service Seeks Comment on Certain of the Commission's Rules Relating to High-Cost Universal Service Support and the ETC Designation Process*, CC Docket No. 96-45, FCC 03J-1, released February 7, 2003 ("Portability Proceeding")

<sup>3</sup> Actual costs are also referred to as embedded costs

<sup>4</sup> Second Report and Order and Further Notice of Proposed Rulemaking in CC Docket No. 00-256, Fifteenth Report and Order in CC Docket 96-45, and Report and Order in CC Docket Nos. 98-77 and 98-166, *In the Matter of Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange*

If a competitive marketplace could provide universal service (and there are years of evidence that it cannot), there would be no need for federal high-cost support mechanisms.

WWC claims that the current disparity between carriers operating under price-cap and RoR regulation has no justifiable basis, stating, “there is nothing unique about the rural ILECs.”<sup>5</sup> WWC is wrong. Rural LECs are fully committed to the principle of universal service -- they were created, often in the spirit of cooperation among neighbors, to provide telephone service in high cost areas that the former Bell System chose not to serve. Rural LECs have constructed facilities in some of this country’s most remote and difficult areas to serve in order to enable all Americans affordable access to a ubiquitous, high-quality network. All telecommunications carriers, including wireless providers, and many ancillary providers, such as Internet Service Providers, have benefited, as has the nation, from this network established, in part, by rural LECs. Congress, well aware that universal service has served as the cornerstone of national and state telecommunications policy for over seventy years, accordingly identified it as one of the twin goals of Telecommunications Act of 1996 (“Federal Act”). Additionally, Congress recognized the significant differences between large and small carriers and their customer bases and included certain protections for rural LECs in the Federal Act.

### **III. RoR Regulation is Not the Reason that an Equitable Competitive Environment Does Not Exist in the Service Areas of Rural LECs.**

WWC claims that RoR regulation “precludes the development of competition on a level playing field...”<sup>6</sup> WWC itself belies the statement in its Petition, when it acknowledges that it has received status as a competitive Eligible Telecommunications Carrier (ETC) in fourteen of the nineteen states in which it operates.<sup>7</sup> WWC’s competitive ventures can be characterized as extremely successful. In a few short years, it has secured over 200,000 customers, which will

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*Carriers and Interexchange Carriers, CC Docket No. 00-256, Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Access Charge Reform for Incumbent Local Exchange Carriers Subject to Rate-of-Return Regulation, CC Docket No. 98-77, and Prescribing the Authorized Rate-of-Return for Interstate Services of Local Exchange Carriers, CC Docket No. 98-166, FCC 01-304, rel. November 8, 2001, para. 224 (MAG Order and FNPRM).*

<sup>5</sup> WWC Petition, p. 24.

<sup>6</sup> WWC Petition, p. 17.

<sup>7</sup> WWC Petition, p. 3.

generate annual federal high cost support in excess of \$60 million in 2004.<sup>8</sup> It is difficult to comprehend how WWC's ability to compete has been impaired by the type of regulation to which its competitor is subject. WWC is not the only company competing against rural LECs, as more than 30% of rural LECs has a competitive ETC in its service territory and 14% have multiple competitive ETCs.<sup>9</sup> The wireless industry's trade association, the Cellular Telecommunications & Internet Association (CTIA), also contradicts WWC's claim. In comments filed before this Commission, CTIA states "...consumers in all U.S. counties or local government equivalents have access to wireless service offerings in rural America."<sup>10</sup>

There is partial truth within WWC's statement regarding the current competitive situation between rural LECs and CETCs. Currently, the competitive playing field in the service areas of rural LECs is significantly tilted, but in favor of the wireless carriers, not the rural LEC. This current situation is a direct result of actions by many state commissions and the Wireline Competition Bureau allowing wireless carriers unfettered access to federal and state universal service support mechanisms without "burdening" them with even the slightest obligation of actually providing true universal service. While the Federal Act requires a competitor to offer supported services to all customers throughout the LEC's service territory in order to gain ETC designation,<sup>11</sup> implementation of the law has required far less. First, the Commission determined that the competitive ETC only has to have the ability to serve all individuals who request service. Second, a competitor can seek to redefine the LEC's service territory as less than the study area to avoid serving exchanges it is uninterested in serving.<sup>12</sup> Finally, the law also allows competitive ETCs to use the incumbent's facilities to meet this obligation. Despite the intent of the Federal Act to impose equal obligations to provide service upon all carriers with ETC status, the reality is that this responsibility remains where it has always resided – with the rural LEC.

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<sup>8</sup> USAC Universal Service Fund Projection, HC01 and HC05 Reports, 1<sup>st</sup> quarter, 2004, found at <http://www.universalservice.org/overview/filings/2004/Q1/>.

<sup>9</sup> USAC Universal Service Fund Projection, HC03 Report, 1<sup>st</sup> quarter, 2004, found at <http://www.universalservice.org/overview/filings/2004/Q1/>. Four hundred and seven of the 1,351 rural LEC study areas have a competitive ETC, while 191 have more than one competitive ETC.

<sup>10</sup> *In the Matter of Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies to Provide Spectrum-Based Services*, WT Docket 02-381, Comments of the Cellular Telecommunications & Internet Association at Summary ii. CTIA continued stating that 95 percent of the U.S. population has three or more operators offering mobile service in the counties in which they live.

<sup>11</sup> U.S.C. §214(e)(2)

<sup>12</sup> WWC has requested to redefine the service territory of a Colorado LEC serving less than 2,000 customers at the exchange level. The CoPUC has indicated it will approve this redefinition despite the LEC's entire study area

In addition to retaining its COLR responsibilities, the rural LEC is also required to (1) comply with extensive customer service rules; (2) meet numerous service quality standards; and (3) undergo intrusive and prolonged proceedings to modify rates. All of these requirements require the rural LEC to incur considerable costs. In practice, wireless ETCs have none of these obligations. Based on its strenuous opposition to proposals in several states to require all ETCs to meet these requirements, it is evident that WWC recognizes the costs associated with these obligations.

The nation's consumer advocates, the National Association of State Utility Consumer Advocates ("NASUCA"), have also recognized that the competitive playing field significantly tilts in favor of the wireless ETC. NASUCA expressed concern that the continuation of this practice could have a negative impact upon universal service.

*ETC eligibility should entail specific public interest obligations in exchange for public support. In the case of ILEC ETCs, the quid pro quo is self-evident and traditional. ILECs typically provide high quality, highly reliable service ubiquitously throughout their service territory and are providers of last resort for that territory. Moreover, customers of ILECs have the substantial benefit of state regulation, which enforces service quality rules, billing and collection rules, and ensures just and reasonable rates. By contrast, wireless carriers are generally unregulated entities that provide highly variable service quality, varying levels of customer service, unilaterally determined billing and collection policies, unilaterally determined rates and have no requirement to provide facilities in specific areas.<sup>13</sup>*

Clearly, the nature of the regulation to which rural LECs are subjected has not affected WWC's ability to compete. However, WWC is correct – the competitive arena is not level. Until all ETCs face the same responsibilities and obligations, fair competition cannot exist.

#### **IV. Federal RoR Regulation has Encouraged Technological Innovation.**

The proliferation of broadband in the service areas of rural LECs directly challenges WWC's claim that RoR regulation eliminates incentives for carriers to "introduce innovative technologies and services."<sup>14</sup> Despite serving areas with significantly lower customer densities,

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residing within WWC's certificated service territory, clearly reflecting an ability to serve. Coincidentally, the exchange WWC refused to serve contained fewer than 200 customers spread over 1,000 square miles.

<sup>13</sup> Comments of the National Association of State Utility Consumer Advocates, CC Docket No. 96-45, FCC 03J-1, filed May 5, 2003, at p. 8.

<sup>14</sup> WWC Petition, p. 22.

rural LECs are deploying high-speed Internet access at a far greater rate than LECs operating under price cap regulation. During 2003, approximately three-fourths of rural LECs offered digital subscriber line service (“DSL”) to seventy-eight percent of their customers.<sup>15</sup> The successful deployment of broadband in rural, high-cost areas can be directly attributed to a regulatory regime, which provides a reasonable opportunity to recover the cost of investing in new technologies. The Rural Task Force (“RTF”)<sup>16</sup> confirmed this fact when it found that basing federal universal service support on embedded costs provides carriers serving rural areas increased incentives to invest in new infrastructure and technologies.<sup>17</sup>

Separating the link between regulated revenues and actual cost provides no incentive to invest, as carriers receive the same revenues, regardless of whether any investment in facilities is actually made. In fact, it is actually more of a *disincentive* to invest, as carriers operating under this regulatory regime making no investment actually reap greater returns. A prime example of this is the Colorado Public Utilities Commission’s (“CoPUC”) recent experience with providing WWC access to federal and state universal service support mechanisms. During 2001, the CoPUC granted WWC competitive ETC status in the service areas of six small single-exchange rural LECs.<sup>18</sup> As a result of this action, WWC received approximately \$270,000 in federal universal service support based upon the rural LECs’ cost of providing service.<sup>19</sup> Two years later, WWC returned to the CoPUC to seek competitive ETC status in the service territory of another rural LEC. During that proceeding, uncontroverted evidence was introduced demonstrating that from the date of its first ETC grant until the hearing – a period of almost two years -- WWC had failed to add a single tower in the state nor had it made equipment additions or an application for radio equipment.<sup>20</sup> The failure to invest in facilities in rural Colorado cannot be attributed to a lack of customer need, as anyone who has driven through the sparsely

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<sup>15</sup> Fulfilling the Digital Dream, NECA 2003 Access Market Survey, found at <http://www.neca.org/media/2003AMS.pdf> (NECA 2003 Survey).

<sup>16</sup> The Rural Task Force was appointed by the Federal-State Joint Board on Universal Service and comprised of individuals representing a broad range of interests in the telecommunications industry including rural LECs, CLECs, interexchange carriers, state regulators, consumer advocates and wireless providers. Gene DeJordy of Western Wireless, and a signatory to the instant Petition, served as the representative of the rural wireless industry.

<sup>17</sup> *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, FCC 00J-4, Recommended Decision, Adopted and Released December 22, 2000, pg. 11.

<sup>18</sup> Agate Telephone Company, Blanca Telephone Company, Pine Drive Telephone Company, S&T Telephone Company (Kanorado Exchange), and South Park Telephone Company

<sup>19</sup> USAC Universal Service Fund Projection, HC01 Report, 3rd quarter, 2003, found at <http://www.universalservice.org/overview/filings/2003/Q3/>.

populated areas for which WWC received ETC status can attest. This disconnect between revenues and investment allowed WWC to use its universal service support to enhance its bottom line, instead of investing in new technologies. WWC CEO John Stanton acknowledged this in a meeting with the investment community:

*The USF subsidy represents an incremental revenue source, which we believe should improve our revenue and EBITDA estimates by \$6-8 million during the first quarter and \$24-30 million during 2003 as **the incremental revenue is almost all margin.***<sup>21</sup>

#### IV. The Commission Should Soundly and Swiftly Reject This Petition.

Any other action by the Commission regarding this Petition, other than a swift and thorough rejection, would harm the Commission's authority. The Commission is already considering alternative regulatory regimes for rural LECs.<sup>22</sup> Far from a stagnant proceeding, the MAG FNPRM has completed its comment cycle and TCA expects that the issue is receiving the appropriate attention from the Commission. As WWC did not participate in this proceeding regarding alternative regulation, the very motives of its Petition requesting duplicate consideration of the issue must be questioned.<sup>23</sup>

Further, the bulk of the arguments advanced by WWC in support of its Petition have already been presented by WWC to the Federal-State Joint Board on Universal Service (Joint Board) in the Portability Proceeding.<sup>24</sup> For the Commission to even consider this Petition would allow WWC to improperly influence the Commission before the Joint Board can issue its recommendation. The Commission should soundly reject this Petition for what it truly is – a baseless pack of allegations against the carriers that WWC considers to be its competition in its never-ending search for federal universal service funds.

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<sup>20</sup> CoPUC Docket No. 03A-061T. Cross answer testimony of CTA witness Glenn Brown, p. 5. Mr. Brown obtained this evidence from the FCC's Universal Licensing System database.

<sup>21</sup> "Western Wireless (WWCA): USF Provides Upside To Our EBITDA Estimate," Salomon Smith Barney Research Note, issued January 9, 2003, at page 2 (emphasis added). As previously noted, WWC projects \$60 million in federal high-cost support in 2004.

<sup>22</sup> MAG Order and FNPRM, paras. 212-276.

<sup>23</sup> Prior to the MAG Order and FNPRM being released by the Commission, WWC participated in frequent *ex parte* presentations in the docket. Therefore, WWC must certainly be aware of the current FNPRM.

<sup>24</sup> See *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Reply Comments of Western Wireless Corporation, filed June 3, 2003. WWC even cites the earlier submission to the Joint Board in this instant Petition. WWC Petition pp. 5-6.

Respectfully submitted,

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